APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1915

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - - - - - *Petitioner*

v.

THE HONORABLE JAMES F. GORDON, United States District Judge, United States District Court for the Western District of Kentucky, and

GENERAL ELECTRIC COMPANY, a New York Corporation, - - - - - - - *Respondents*

ORDER—Entered November 26, 1971

BEFORE: PECK, McCREE, and KENT, Circuit Judges.

The petition for mandamus to compel respondent to vacate his order denying petitioner a jury trial having come on to be heard, and it appearing that the action was commenced by petitioner on November 5, 1970, and that the relief sought was purely equitable in nature; and it further appearing that on September 8, 1971, petitioner filed a motion for leave to file an amended complaint that contained a prayer for legal relief; and it appearing that on September 14, 1971, respondent ordered the filing of the aforesaid complaint except for the paragraph contained therein demanding a jury trial on all legal issues; and it appearing that by order of October 12, 1971, respondent declined to allow petitioner a jury trial on the legal issues raised by the amended complaint; and it further appearing that leave to file an amended complaint may be granted by the court

subject to reasonable conditions and that the attaching of such conditions, including the striking of a timely demand for a jury trial on issues raised by the amended complaint, is within the sound discretion of the court; upon consideration, it is ORDERED that the petition for mandamus be, and it hereby is, denied. *See Parissi* v. *Foley,* 203 F. 2d 454 (2d Cir. 1953).

Entered by order of the court
(s) James A. Higgins
Clerk

UNITED STATES OF AMERICA

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT OWENSBORO

Civil Action No. 2526

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - - - - - *Plaintiff*

v.

GENERAL ELECTRIC COMPANY, a New York Corporation, - - - - - - - *Defendant*

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Entered December 28, 1971

The Court finds:

FINDINGS OF FACT

I.

The plaintiff, Local 783, Allied Industrial Workers of America, AFL-CIO (Local 783), and the defendant, General Electric Company (G.E.), are parties to a collective bargaining agreement within the meaning of the Labor Management Relations Act.

II.

This is an action by the said plaintiff to enjoin an alleged violation of the collective bargaining agreement and for damages.

The principal issue is whether G.E. violated the farm-out language of the collective bargaining agreement, which reads as follows:

"Section 5 Farming Out

There shall be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant."

This "farming-out" paragraph has appeared in each of the collective bargaining agreements between the parties from 1945 down to the present.

III.

At its multi-plant operations in Owensboro, Kentucky, G.E. manufactures, among other things, receiving tubes for the radio and television industry. On January 21, 1970, it formally announced to the Owensboro employees that mounts for certain miniature tubes would be assembled in Singapore. The parts for these mounts and the machinery for assembling the mounts were shipped from G.E.'s Owensboro plant to G.E.'s Singapore plant. Because of their small size, these mounts could be assembled in large quantities and shipped back to the Owensboro plant for finishing work.

In June, 1970, mount production was commenced in Singapore with a gradual buildup in production until the desired levels of production were reached in October of that year. Receiving tubes are grouped by families with similar characteristics. Mounts for twenty-one different families of miniature tubes have been made in Singapore at various times since the commencement of production. All of the mounts come back to Owensboro for finishing, even though a small quantity of them are completed in Singapore for quality control purposes. (All of these tested tubes come back to Owensboro's G.E. plant for final processing.) In the first eleven months of 1971, the Singapore facility manufactured about 15% of the total number of mounts made in both Singapore and Owensboro.

IV.

Plaintiff has not proved that G.E. breached the collective bargaining agreement.

A. *Article XVI, Section 5—Farming Out.* The prohibition against farming-out or transferring of machinery or work contained in Article XVI, Section 5 of the collective bargaining agreement has no application to a transfer of machinery or work from one G.E. plant to another G.E. plant. This is confirmed by:

(1) The Company's transferring of machinery or work from the G.E. Owensboro plant to other G.E. plants of power tube and cathode ray tube production to Schenectady in 1945, shortly after the farm-out language first appeared in a collective bargaining agreement; the transfer of tube production equipment from Owensboro to Anniston to be used for the manufacturing of miniature tubes formerly manufactured in Owensboro beginning in 1952; and the thick film operation to Syracuse in 1970.

The plaintiff had knowledge of each of these transfers and knew that at the time of the transfers, employment was being reduced in some cases, and in other cases employees were being laid off for inventory adjustment days due to overproduction. The plaintiff also had knowledge of the establishment of the Singapore operation for eight months prior to the filing of its grievance, as testified to by Cecil Harrison, a vice president of the union.

(2) The plaintiff and the defendant agreed that the farm-out language of this article had no application to a transfer from one G.E. plant to another G.E. plant at the time of the negotiation and signing of the current collective bargaining agreement between them, as is shown by minutes of the meeting of the negotiators of

January 20, 1970, and February 3, 1970. During the January 20, 1970, meeting of the parties' representatives, the following exchange occurred between T. E. McQueeney, the Company's representative, and Cecil Harrison, Vice President of the Union, J. B. Arnold, regional representative of the plaintiff, and Dennis Warren, a member of the Union Bargaining Committee:

"McQueeney: Suppose a new business was thinking of coming in here and we told them of the good work climate and people, and then told them that if they were to move equipment in they should know they could never move it out to another of their locations. He'd ask how many other G.E. locations have the problem and we'd say none. He'd say goodbye.

"Dugger: That gets away from farmout. Besides that's not farmout in G.E.

"McQueeney: Can you see how unattractive we could be to a new business? Our current language says we can't farm out for the purpose of curtailing or reducing the work force. Your proposal seems to say that we couldn't move equipment to Springfield.

"Harrison: Even under our language you'd be breaking the agreement when you sent stuff to Sprinfield since it would reduce some work here, if we meant farmout to include with G.E. moves. We don't mean that.

"Arnold: There's quite a difference between farming out and transferring work between locations. We haven't made a stink about that.

"Warren: Look at your thick film move to Syracuse. We didn't complain about that either.

"Erwin: We're aware of the changing realities of a business which says some things come in here from

other G.E. locations and some go out to other G.E. plants. What we want to do away with is farming work out to Faith Tool & Die, or a place like 'Knuckles' when we've got equipment and people in here who can do the work, and we think cheaper, too. We do enough rework at EDC on farmed out stuff to offset the cost of doing it here to begin with, to specifications without rework.

"McQueeney: I'm just not aware of the fact that this does, in fact, go on.

"Erwin: Well, it does, and that's what we don't like. We've never complained about transferring stuff to other G.E. locations. We sent those base staking machines to Tell City and they sent the bases back here for processing for sometime before the machines were finally returned here. We didn't cry about that, because that's not farmout.

"McQueeney: I agree wholeheartedly. Let's discuss this again some more."

Again, on February 3, 1970, the following colloquy occurred:

"McQueeney: Let's take up where we left off at our last meeting. I believe it was on:

Article XVI—Section—Farming Out

It must be pretty evident after our last discussion just how important our concern is for this language. Facing the continuing decline of the core business we want to be able to attract other businesses to take its place. There are two ways we go about getting new employment opportunities into Owensboro. First, we continually look for ways to add new product innovations within the Tube Department such as we did when such things as DDO and Microwave Products were added.

A second effort we make is to search for new departments to move into Owensboro such as the one we announced recently in the Headliner.

Of course, this contract and therefore this farmout language would not affect a new product department such as the one announced, but the very existence of this clause does nothing to enhance the attractiveness of the Owensboro location. Even decisions to add to the Tube Department must involve review and concern for the current farmout provision; this is why I explored so thoroughly with you your interpretation of the current farmout language. First, let me say that we are not willing to revise the current language as you propose; we are simply unwilling to broaden the current spirit and intent of this language. Second, personally I am not happy with even the current language but considering the arbitration rulings which give it definition and considering your interpretation that this language in no way, shape or form applies to the transfer of work or equipment from Owensboro to anyplace within the General Electric Company, on that basis, I'm willing to keep the language we have in the agreement. Have I correctly stated at least that part of your interpretation of this language correctly that is, that the language in no way applies to the transfer of work or equipment from Owensboro to any other location in the General Electric Company?

"Arnold: That's right.

"Erwin: I agree.

"McQueeney: In that case, then, we see no need to change or remove our current language.

"Erwin: All we want is, if you have the space and equipment you keep the work here.

"McQueeney: I understand your intent, but this language is really much broader and expects work to be maintained here regardless of competitive costs, scheduling, and a host of other factors which contribute to such a decision.

"Erwin: We just are sure that we farm out work that could be done in here and then have to rework it so that our final cost is more than if we did it ourselves.

"McQueeney: As I've mentioned to you before, I'm most interested and concerned about any such facts you can bring to our attention. If I'm to correct this situation, I need to arm myself with facts before I can broach the subject to our management. The other point you mentioned was the suspicion of collusion in assigning outside work. Proof of such an allegation would result in those people being removed from the G.E. payroll. We will not stand for any such infractions of Company policy.

"Erwin: We worry about the level of employment, and that's the main reason for us wanting this change. It's even better for you.

"McQueeney: One of the problems with new language is that it disregards all rulings and past practices and opens the whole subject to new interpretation. We will not risk any further restrictions on our ability to get a job done at the best price available, and new language presents such a problem.

"Erwin: You've even got a machinist technician at EDC doing 100% inspection on all work done outside when it's returned. It's probably not figured in the cost.

"McQueeney: I welcome such facts, and also say to you I see no hope of expanding our current language."

In consequence of this exchange between representatives of the parties, new language proposed by the Union was

rejected and the old language of the contract, which had been in effect since July, 1945, was left in the contract and is the present language of the contract.

(3) The Company announced its Singapore operations on January 21, 1970, and shortly thereafter began the transfer of equipment, materials and personnel to Singapore, all of which activities have continued down to date and all of which activties were known to the plaintiff and its members. The plaintiff made no protest over these activities prior to the filing of its grievance of June 2, 1970. The grievance was heard in a Step III grievance session on June 16, 1970, in which the following colloquy occurred in respect to the meaning of the farm-out language:

> "(Dodson) This is a union grievance charging violation of the farmout language. I reviewed excerpts of our minutes taken during contract negotiations and was under the impression then, and still am, that we all understood the farm-out language. We have the understanding that farm-out referred to firms such as Faith Tool & Die, etc., and not another G.E. plant. Therefore, it is our position that we are not violating the contract language.
>
> "(Erwin) At no time did we mention of machines and work being farmed out to foreign competition.
>
> "(Dodson) The distance doesn't matter, it's still a G.E. plant. What's the difference if we took it to Tell City or Singapore?
>
> "(Erwin) In the case of Tell City or Springfield it has been a reciprocal situation.
>
> "(Dugger) They're going to start the product over there and complete it here. This thing is going to hurt our people in Owensboro. . . .
>
> "(Erwin) When we were talking we at no time approved the transfer of machinery to Singapore thereby curtailing employment. Singapore in no way entered

into our discussion. At Tell City, for example, you have a decent rate of pay. When you're working people for 16¢ per hour in Singapore, that a lot of difference.

"(Dodson) What you're saying is that the distance and rate of pay determines farm-out.

"(Dugger) The tubes will probably be stamped 'Made in USA.'

"(Erwin) Not until after you signed the contract did you mention the Singapore Operation.

"(Dodson) The possibility of an offshore facility has been discussed for some time.

"(Erwin) Not in our circles. You talk about foreign competition, and G.E. *is* the foreign competition.

"(Roberts) The boys upstairs must be hypocrites.

"(Erwin) We were never talking about send work overseas.

"(Dodson) You say there's a differnce between the continental United States and overseass?

"(Erwin) You're removing that work.

"(Chancellor) What Denny is referring to is the contract language. Is your interpretation in this matter that we could send this work to say Trenton, N. J. and it wouldn't be farm-out, but if it goes geographically out of the country then it is?

"(Erwin) I may be wrong, but I believe anyone sitting in judgment will recognize the difference."

(4) The Company is not transferring machinery or work to Singapore "for the purpose of curtailing or reducing employment" in the plant, but on the contrary, it is attempting to preserve and protect the employment at its Owensboro plant by meeting Japanese and other offshore competition

in the receiving tube industry. The magnitude of the adverse effect upon the Company and its employees of the foreign competition is illustrated as follows:

> The Company's share in the original equipment market (TV sets and radios sold domestically) for receiving tubes declined from 25.4% to 17% in the four years from 1966 to 1970, whereas tubes imported in the same market increased from 28.3% to 48%; in the total U. S. receiving tube market (original equipment and renewal sales) sales of imported tubes increased from 19.9% to 22.7% by November, 1971, while the total market was declining from 412 million tubes to 218 million tubes, an almost 50% decrease; and during this five-year period of decreasing sales and of a decreasing market for tubes and increased foreign encroachment, employment at the Owensboro plant has been steadily decreasing despite G.E.'s efforts to prevent this by closing down other plants and bringing their production into Owensboro. Foreign tube manufacturers have driven the prices for tubes sold in the United States lower and lower. On the average, G.E.'s direct overhead, labor and material costs exceed the price of Japanese miniature tubes. For example, when the Japanese price went below the direct cost of tuner tubes, and G.E. was unable to meet the new price, it lost annual sales of 2.3 million tubes to Sarkes Tarzan, a large tuner tube customer.

General Electric's witnesses could not say positively, as of this date, whether or not the Singapore operation would make it possible to reduce the variable cost of tube production and, therefore, the price of the tube sufficiently to regain its customers; but G.E. has already sold 4¼ million tubes below cost in the expectation that the Singapore op-

eration will soon make it possible to continue to sell at these prices.

The cost reduction from the Singapore operation for the type tubes manufactured there has not only made possible the sale of these tubes, but it will increase the sale of tubes manufactured wholly at the Owensboro plant. This is because G.E. sells a "market basket" of tubes to its principal customers with some of the tubes in the "market basket" being those which are partially made in Singapore and some being those which are made entirely in Owensboro.

When, subject to price competition, General Electric Company reduced the price of the tube kit known as the "All American Five" from $3.50 to $.91, two of its largest competitors, Sylvania and RCA got out of the business of producing and selling these tubes rather than reduce the price. Seven receiving tube manufacturers have gone out of the business entirely due to market declines and foreign competition.

The Witness Farnsworth testified, and the Court finds, that the question is not whether to make the tube mounts in Singapore or in Owensboro; it is a question of making them in Singapore or not making them at all.

(5) The plaintiff has not established that there has been any diminution of employment caused by the Singapore plant. While employment has declined since first production in Singapore in June, 1970, the market for receiving tubes also has been declining due to foreign competition, replacement of receiving tubes by improved technology, and general economic conditions. The October, 1969, and June, 1970, layoffs were due to ecnomic conditions and were not related to the Singapore operation. From July, 1970, down to date, the Company called back more employees than were laid off. A finding that the Owensboro employment reductions bears a causal relationship to the establishment of the Singapore plant would be based on pure speculation. There-

fore, this Court finds that plaintiff has not shown any reduction in local employment as a result of G.E.'s Singapore operation.

B. Article XVI, Section 3. The shipment of equipment to Singapore was begun months before filing of either of the grievances described in the complaint and any machinery and work thus transferred was not transferred as a result of a grievance in process within the meaning of Article XVI, Section 3. In addition, the plaintiff has not established that any work was transferred out of the plant *as a result* of the first grievance.

C. *Article V, Section 2.* The Union has not established that the Company has transferred any jobs under dispute within the meaning of Article V, Section 2, of the agreement. There was no dispute as to any job at the time of G.E.'s establishment of its Singapore operation.

CONCLUSIONS OF LAW

I.

Plaintiff contends that the introduction of the minutes of the January 21, 1970, and February 3, 1970, bargaining sessions is not admissible in evidence.

Firstly, in interpreting a collective bargaining agreement, the courts and arbitrators should not be bound by the usual rules in contract construction and should make wide use of all relevant materials.

> "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve." *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 4 L. ed. 2d 1403, 80 S. Ct. 1343 (1960), 363 U. S. at 567, 4 L. ed. 2d at 1406, 1407.

In elaborating on the opinion of the Court in the *Steelworkers Trilogy,* of which *United Steelworkers* v. *American Mfg. Co.* cited above is one, Mr. Justice Brennan and Mr. Justice Harlan commented as follows:

> "Words in a collective bargaining agreement, rightly viewed by the Court to be the charter instrument of a system of industrial self-government, like words in a statute, are to be understood only by reference to the background which gave rise to their inclusion. The Court therefore avoids the prescription of inflexible rules for the enforcement of arbitration promises. Guidance is given by identifying the various considerations which a court should take into account when construing a particular clause—considerations of the milieu in which the clause is negotiated and of the national labor policy." *United Steelworkers* v. *American Mfg. Co.,* at 363 U. S. 570, 4 L. Ed. 2d 1432, 1433.

See also *Forrest Industries, Inc.* v. *Local No. 3-436,* 381 F. 2d 144 (9th Cir. 1967), which, in following the directions of the Court in the *Steelworkers Trilogy,* held as follows:

> "As Mr. Justice Brennan has observed, words in particular collective bargaining agreements are like words in a statute. The same word may have different meanings in different contexts and the language in each agreement should be construed with reference to the particular practices, background and milieu which gave rise to its use."

And see *Communications Wkrs. of Amer.* v. *Pacific N.W. Bell Tel. Co.,* 337 F. 2d 455 (9th Cir. 1964).

> "The very nature of a collective bargaining agreement requires that it be read in the light of bargaining history and the history of the parties' own interpretations." 337 F. 2d at 459.

For additional authorities holding that there is broad latitude in the admissibility of bargaining history to construe a collective bargaining agreement, see:

Local No. 483 v. *Shell Oil Co.*, 369 F. 2d 526 (7th Cir. 1966);

Local No. 787 v. *Collins Radio Co.*, 317 F. 2d 214 (5th Cir. 1963);

Pacific N. W. Bell Tel. Co. v. *Communications Wkrs.*, 310 F. 2d 244 (9th Cir. 1962); and

East Bay Union v. *Fibreboard Paper Prod. Corp.*, 285 F. Supp. 282 (N.D. Calif. 1968).

This is a case in which the issues before the Court are specifically excluded from arbitration by the collective bargaining agreement. Therefore, the Court performs the arbitrator's function and should consider the same evidence which the arbitrator would consider.

> "When actions for breach of the substantive terms of the contract are instituted under Section 301 in the absence of arbitration clause, the courts should assume the arbitrator's responsibility." Archibald Cox, Reflections Upon Labor Arbitration, *72 Harv. L. Rev.* (1959).

And the arbitrator's function is to recognize that collective bargaining agreements leave much unsaid, the answers to which must be found outside of the agreement itself.

> "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institu-

tional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words." Archibald Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. (1959) pp 1498, 1499, quoted with approval in *United Steelworkers of America* v. *Warrior & Gulf Navigation Company*, 363 U. S. 574, 579-580; 4 L. ed. 2d 1409, 1415-1416; 80 S. Ct. 1347.

Secondly Article XVI, Section 5 of the agreement before the Court is ambiguous and, therefore, may be explained under the parol evidence rule. The clause prohibits farming-out, letting-out, or transfer for the purpose of curtailing or reducing employment "in the plant". The entire clause escapes any well-defined generally accepted meaning. Further, the contract uses the word "plant" in so many different ways that the meaning of the word is not clear. See Article V, Section 2 "the local plant", and Article XVI, Section 3 "a plant".

The language of Article XVI, Section 5, first appeared in the collective bargaining agreement between the parties of July, 1945. The immediately preceding collective bargaining agreement of May, 1944, contained an entirely different provision as follows:

> "4. The Company agrees that it will not farm out any of its work to any other plant or plants for the purpose of curtailing or reducing employment in its plants covered by this contract."

The change from the 1944 to the 1945 contract language was a change from comparative clarity to one of obscurity. The parties could have resolved the ambiguity by using the

phrase "the local plant" or by prohibiting farming-out to "any other plant or plants". In light of the many different uses of the phrase, the defendant is entitled to explain the meaning of the word by the introduction of prior understandings as to this meaning. Restatement of Contracts, §§ 238, 231 and 242.

II.

Plaintiff argues that evidence may not be heard to explain the meaning of one portion of Article XVI, Section 5, but then urges the Court to consider evidence to explain another portion of it. The plaintiff urges that the words "for the purpose" do not mean what they say. It offers in evidence the Arbitration Award of Hon. Paul H. Sanders, dated July 11, 1959, construing "purpose of" to mean "effect of".

Consistent with the authorities cited under Item I, the Court has considered this Arbitration Award. It has also considered the Arbitration Award of Hon. Leo C. Brown, dated March 23, 1964, holding that "purpose of" means "intent".

The two Arbitrators Awards are conflicting and neutralize one another. The plaintiff has not presented any other evidence as to agreements or contemporaneous constructions between the parties as to the meaning of the language. Defendant has, however, shown the opposing constructions of the language as reflected in the Arbitrators Awards and has further shown that in 1966 and 1970, the Union sought a modification of Article XVI, Section 5, to strike the phrase "purpose of" and to provide that it should be a violation of the contract to transfer, contract, or subcontract any work by the Company, "provided it has the facilities for doing the work, the floor space, and the available trained personnel". These proposals were rejected by the Company and have never been incorporated into the collective bargaining agreement.

The Court is therefore left to construe the phrase in the light of the Union's attempts to modify it and in the light of the common meaning of the words used. In this regard, the word "purpose" is defined in the Oxford Universal Dictionary on Historical Principals (1955) as follows:

> "To place before oneself as a thing to be done or attempted; to form a purpose of doing (something)."

The Court finds as a matter of law that the parties are bound by the dictionary and common meaning of the word "purpose" as requiring an intent or design to reduce the employment in the plant. As shown in the Findings of Fact above, the plaintiff has not proven such an intent or design on the part of the defendant.

III.

Plaintiff also objects to the introduction of evidence of the past practices of the parties in construing Article XVI, Section 5. The past practices of the parties are admissible in determining the meaning. *Pittsburg Die Sinkers Lodge No. 50* v. *Pittsburg Forgings*, 255 F. Sup. 142 (WD Pa., 1966), and *Colorado Milling & Elevator Co.* v. *Glenn*, 118 F. Sup. 943 (WD Ky., 1954). Where the identical language has appeared in a series of collective bargaining agreements over a long period of years, the past practices of the parties under all of the prior agreements is admissible. *Pekar* v. *No. 181*, 311 F. 2d 628 (6th Cir. 1962).

IV.

Plaintiff cited *United Shoe Workers of America, Local 127, AFL-CIO* v. *Brooks Shoe Mfg. Co.*, 298 F. 2d 277 (3rd Cir., 1962), apparently for the proposition that any movement of machinery and work between two plants is a contract violation. Of course, each case must be determined in the light of the particular collective bargaining agreement. The contract before the Court in the *Brooks Shoe*

case, *supra*, was quite different in that the farm-out clause concluded with the following:

> "It is agreed that the firm will continue to make the better grade shoes in their present plant."

There was also a run-away shop clause providing that:

> "It is agreed by the Employer that the shop or factory shall not be removed from the County of Philadelphia during the life of this agreement."

As previously noted, the language in Article XVI, Section 5, is quite different from that in *Brooks Shoe*.

V.

In view of the above Findings of Fact and Conclusions of Law, the Union has not established its burden of proof that there has been any violation of either Article XVI, Section 6, Article XVI, Section 3, or Article V, Section 2, of the collective bargaining agreement.

Dated this 27 day of December, 1971.

(s) James F. Gordon, *Judge*
United States District Court,
Western District of Kentucky

UNITED STATES OF AMERICA

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

Civil Action No. 2526

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - - - - - *Plaintiff*

v.

GENERAL ELECTRIC COMPANY, a New York Corporation, - - - - - - - - *Defendant*

JUDGMENT—Entered January 13, 1972

This cause having been tried before the Court and the Court having entered Findings of Fact and Conclusions of Law,

NOW, THEREFORE, be it ordered and adjudged that the complaint and all claims asserted therein by the plaintiff be, and hereby are, dismissed with prejudice and at the cost of the plaintiff.

Dated this 12th day of January, 1972.

(s) James F. Gordon, Judge
United States District Court
Western District of Kentucky

Prepared by and Submitted for Entry by:
Sandidge, Holbrook, Craig & Hager

By (s) Morton Holbrook
Attorneys for Defendant

Have Seen and Objected to:

Lovett, Kusch and Wible
By (s) Charles S. Wible
Attorneys for Plaintiff

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1260

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO,
Plaintiff-Appellant,

v.

GENERAL ELECTRIC COMPANY,
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Kentucky.

OPINION—Decided and Filed January 5, 1973.

Before: CELEBREZZE, McCREE and MILLER, Circuit Judges.

CELEBREZZE, Circuit Judge. This case involves an appeal from two determinations of the District Court: the first from a preliminary order granting the Appellant Union permission to file an amended complaint and striking from the amendment the demand for a jury trial; the second from the final judgment of the District Court dismissing the Union's complaint.

The Local 783 of the Allied Industrial Workers of America (the Union) and General Electric Company (the Company) are parties to a collective bargaining agreement dated March 3, 1970 and to remain in force through August 19, 1973. The agreement covered the Company's facilities

at its Owensboro, Kentucky location.[1] The dispute in question involves the Company's alleged violation of a farming-out clause contained in the present agreement and in all of the previous agreements between the Union and the Company since 1945. That clause, Article XVI, Section 5 of the present agreement, provides the following:

> "There shall be no farming or letting out or transfer of machinery or work for the purpose of curtailing or reducing employment in the plant."

On March 5, 1970 the Company began a transfer of equipment from its Owensboro facilities to its new plant in Singapore. Subsequent shipments of equipment to the Singapore plant were made periodically throughout 1970 and 1971. Presently, the Company is producing at its Singapore plant tube mounts previously made at the Owensboro facilities.

The original complaint filed by the Union sought to enjoin the Company from transferring machinery, equipment or work from its Owensboro, Kentucky facilities to Singapore or any other location in violation of the collective bargaining agreement between the Union and the Company. While it was alleged that other sections of the Agreement had been breached by the Company, the central question centered around the interpretation of the farming-out clause. It is the Union's position that this operation is a transfer of machinery or work prohibited by the above clause, while the Company contends that the clause does not

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[1]The preamble to the Agreement provides:
"This Agreement is made and entered into between the General Electric Company for its Owensboro operations, Tube Department, with offices located at 316 East Ninth Street, Owensboro, Kentucky, hereinafter referred to as the 'Company' and Local 783 of the International Union Allied Industrial Workers of America, affiliated with the AFL-CIO, hereinafter referred to as the 'Union.' "

apply to transfers of equipment to another General Electric plant.

The District Court determined that the wording of the clause was ambiguous and that parol evidence could be introduced to explain its meaning. The District Court found that the prohibition did not apply to a transfer of machinery or work to another General Electric plant. It is argued by the Union that the clause is clear and unambiguous and that it was error for the District Court to consider evidence of the bargaining history of the two parties relating to the clause and of prior practices involving other transfers of work by the Company.

We first turn our attention to the question of whether the Court erred in not granting the Union a jury trial on its amended complaint. The motion for permission to file an amended complaint was filed some nine months after the original complaint was filed and eight days before the date set for trial. The amended complaint added a claim for money damages for wages lost by employees who had allegedly been laid off because of the transfer of operations to Singapore. The District Court struck the paragraph in the amended complaint which demanded a jury trial and permitted the Union to brief the question of whether a jury trial should be granted. After the Court determined that it would not grant a jury trial, the Union petitioned this Court to issue a writ of mandamus to compel the District Court to vacate its order denying a jury trial. We declined to issue the writ. The Company contends that this issue is not now open to reconsideration.

We have previously held that mandamus will not be used to review an interlocutory order except in extreme and exceptional cases. *Black* v. *Boyd*, 248 F. 2d 156 (6th Cir. 1957), *modified*, 249 F. 2d 441. In the *Black* case, we determined that an order of the District Judge denying petitioner's right of trial by jury presented an exceptional sit-

uation in which it would be appropriate to review the ruling on a petition for mandamus. We found that the refusal to grant the demand for a jury trial, when it had been timely made as a matter of right, could be vacated by the issuance of a writ of mandamus. What is presented here, however, is a different issue. It is contended that the Union's demand for a jury trial was denied, not because it was within the Court's discretion to deny the demand under Rule 39(b) of the Rules of Civil Procedure,[2] but because the trial judge can properly condition his granting of a motion to file an amended complaint under Rule 15(a).[3] In the *Black* case we noted that writs of mandamus have been issued in several cases in order to protect the right of trial by jury but we indicated that such might not be the case where the matter was one within the discretion of the Court. 248 F. 2d 156, 161. *In re Previn*, 204 F. 2d 417, (1st Cir. 1953), involved such a situation and the Court there determined that the matter was one to be settled when and if the case came on appeal from a final judgment. The question presented was whether the trial judge had abused his discretion in not granting a jury trial despite the fact that a timely demand had not been made.

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[2]Rule 39(b) provides that ". . . notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

[3]Rule 15(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

We do not deal here with a judge's exercise of discretion in granting a jury trial even though a timely demand was not made. In such cases the party seeking a jury trial bears a heavy burden in attempting to show an abuse of discretion by the judge. *Noonan* v. *Cunard Steamship Co.*, 375 F. 2d 69 (2d Cir. 1967). *McNabb* v. *Kansas City Life Insurance Co.*, 139 F. 2d 591 (8th Cir. 1943). Our question is whether a judge can, within his discretion, permit a party to amend his complaint only on the condition that a timely demand for a jury trial be stricken from the amended complaint. We think that, given the proper circumstances, such action by the judge would be reasonable. *See Parissi* v. *Foley*, 203 F. 2d 454 (2d Cir. 1953), *rev'd on other grounds*, 349 U. S. 46 (1955). The question, then, is whether the circumstances in this case warranted such a condition. We think they did not. Under Rule 15(a) of the Rules of Civil Procedure, the Union could only amend its complaint by leave of court or by written consent of the adverse party. Here it sought to amend by leave of Court. The granting or refusing leave to amend under the particular circumstances of the case rests in the sound discretion of the trial judge, *Strickler* v. *Pfister Associated Growers, Inc.*, 319 F. 2d 788 (6th Cir. 1963). Rule 15(a), however, provides that "leave shall be freely given when justice so requires." In the absence of any justifying reason, "this mandate is to be heeded." *Foman* v. *Davis*, 371 U. S. 178, 182 (1962). In *Foman*, some factors which would justify a denial of a motion to amend were identified as undue delay, bad faith, undue prejudice to the opposing party, repeated failure to cure deficiencies by previous amendments, and futility of amendment. We find none of these or any other circumstances in this case which would have justified a refusal to permit the Union to amend its complaint.

This determination, however, is not dispositive of this issue. The question remains, if the circumstances do not justify refusal of permission to amend, do they warrant the

condition to the amendment that no jury trial would be granted? The right to a jury trial is guaranteed by the Seventh Amendment and "occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick* v. *Schiedt,* 293 U. S. 474, 486 (1935).[4] It becomes discretionary with the trial judge to grant a jury trial only when the right has been waived by failure to make a demand. But even when exercising its discretion under Rule 39(b) of the Federal Rules of Civil Procedure, "the court should grant a jury trial in the absence of strong and compelling reasons to the contrary." *Swofford* v. *B & W, Inc.,* 336 F. 2d 406, 409 (5th Cir. 1964), *cert. denied,* 379 U. S. 962 (1965). Here, however, there was no waiver of the right. The original complaint requested only injunctive relief and was not triable by jury as a matter of right. The amended complaint requested additional relief in the form of money damages and was triable by jury as a matter of right. The jury demand made in the amended complaint was, therefore, timely. *See Bereslavsky* v. *Kloeb,* 162 F. 2d 862 (6th Cir. 1947), *cert. denied,* 332 U. S. 816 (1947),

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[4]Rule 38 of the Federal Rules of Civil Procedure restates this right and governs the procedure in demanding a jury:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.
>
> * * * * * * *
>
> (d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Bereslavsky v. *Caffey*, 161 F. 2d 499 (2d Cir. 1947), *cert. denied*, 332 U. S. 770 (1947).

As we have noted before, "[i]n the exercise of sound discretion, the granting of leave to amend can be conditional in order to avoid prejudice to the opposing party." *Strickler* v. *Pfister Associated Growers, Inc.*, 319 F. 2d 788, 791 (6th Cir. 1963). A requirement that the amendment be filed by a specified date or that the party amending bear a portion of the additional cost to the opposing party would, in proper circumstances, be reasonable conditions. *Firchau* v. *Diamond National Corp.*, 345 F. 2d 269 (9th Cir. 1965). The circumstances may even warrant, as was the case in *Parissi* v. *Foley*, 203 F. 2d 454 (2d Cir. 1953), *rev'd on other grounds*, 349 U. S. 46, the condition that the case continue to be tried to the court, even though the amendment raises issues triable to a jury. But it is our opinion that the circumstances must indeed be exceptional before a party is required to forego his constitutional right to a trial by jury. "The federal policy favoring jury trials is of historic and continuing strength," *Simler* v. *Conner*, 372 U. S. 221, 222 (1963), and any doubt should be resolved in favor of permitting a jury trial. *Nice* v. *Chesapeake and Ohio Ry.*, 305 F. Supp. 1167, 1185 (W.D. Mich. 1969). *See AMF Tuboscope, Inc.* v. *Cunningham*, 352 F. 2d 150 (10th Cir. 1965). Here the amendment was filed eight days before the scheduled start of the trial. That it was not imperative that the trial begin on the scheduled date is indicated by the fact that the trial judge set the date for trial back two months in order to have the parties brief the issue of whether a jury trial should be granted. Thus, we have a set of circumstances entirely different from those present in *Parissi, supra*, where the case had already been through sixteen days of trial, the amendment was the second filed by the defendant, and it was the defendant who had insisted that the trial begin on a specified date. There is no indication of any improper motive on the part of the Union in filing

its amendment, or that its sole purpose in filing the amendment was to obtain a jury trial. The Court noted merely that nine months had elapsed since the filing of the original complaint and that the case had been set for trial. For these reasons, the Court stated that it was exercising its discretion in declining to allow the Union a trial by jury on the issues of its amended complaint. While the Court did not specifically state that it was exercising its discretion under Rule 15(a),[5] we have treated its order as such because it is clear that the Court would otherwise not have been faced with an exercise of discretion. *Bereslavsky* v. *Kloeb*, 162 F. 2d 862 (6th Cir. 1947), *cert. denied*, 332 U. S. 816 (1947). Accordingly, we find that the circumstances present in this case were not of the exceptional nature required to permit the attachment to the amended complaint the condition that the new issues would not be tried to a jury.[6]

We now look to the question of whether the Court erred in admitting evidence of negotiation discussions and past practices in interpreting the contract. The first determination to be made in this regard is whether the clause of the contract is clear and unambiguous in its meaning. We think that it is. The clause states that "[t]here shall be no . . . transfer of machinery or work for the purpose of curtailing or reducing employment in the plant." We can attach but one meaning to this sentence. The Company may not transfer any work or machinery which has as its purpose the re-

[5]The order of the district Court read: "The Court declines, in the exercise of its discretion, to allow the plaintiff a trial by jury on the issues of its Amneded Complaint, said amendment not being tendered until nine (9) months had elapsed, during all of which time plaintiff could have amended its Complaint, and after the case was set for trial. SO ORDERED."

[6]Of course, when an action involves both equitable and legal issues, as here, "only under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 510-511 (1959).

duction of employment in the plant. The preamble to the contract states that its agreement is between General Electric's Tube Department at [illegible] operations and the local Union. We [illegible] that "the plant" refers to anything [illegible] operation of General Electric.

We have previously held that the determination of whether a clause in a contract is ambiguous is a question for the court to decide. *Tennessee Consolidated Coal Co.* v. *United Mine Workers of America*, 416 F. 2d 1192 (6th Cir. 1969), *cert. denied*, 397 U. S. 964 (1970). Only when the court has determined that the contract is ambiguous is a construction of the clause necessary. After a finding of ambiguity has been made, "[e]vidence of the surrounding circumstances and the practical construction of the parties is admissible to aid in its interpretion." *Tennessee Consolidated Coal Co.* v. *United Mine Workers of America*, 416 F. 2d 1192, 1198 (6th Cir. 1969), *cert. denied*, 397 U. S. 964 (1970). It is true that there is generally broad latitude in the admissibility of bargaining history to construe a collective bargaining agreement. But where the meaning of the clause in question is clear, no construction is necessary. In *Pekar* v. *Local Union No. 181*, 311 F. 2d 628 (6th Cir. 1962) we stated that a contract "must be construed to give effect to the intent of the parties when it was made and the circumstances existing at the time it was made should be looked to to ascertain the intent." *Pekar, supra*, 311 F. 2d 628, 636. In that case, however, there was a finding that the disputed clause was ambiguous and was in need of construction. Here we make no such finding. *See N.L.R.B.* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475 (5th Cir. 1961); *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Co.*, 332 F. 2d 485, 490 (n.5) (2d Cir. 1964), *cert. denied*, 379 U. S. 928 (1964); *Anson* v. *Hiram Walker & Sons, Inc.*, 222 F. 2d 100 (7th

Cir. 1955), *cert. denied*, 350 U. S. 840 (1955), *rehearing denied*, 248 F. 2d 380 (7th Cir. 1957).

While the Supreme Court said in *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960), that "special heed should be given to the context in which collective bargaining agreements are negotiated," 363 U. S. 564, 567, the Court based its decision on the fact that the agreement specifically required arbitration. Similarly, in *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960), the Court, in determining the meaning of an arbitration clause in the collective bargaining agreement, held that evidence of bargaining history was not to be used to decide whether a particular dispute was arbitrable. Rather, the Court relied on the language used in the arbitration clause. The Court did say that the "labor arbitrator's source of law is not confined to the express provisions of the contract as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it," 363 U. S. 574, 582. We do not think the Court was formulating a rule that provides for the use of evidence apart from the contract language itself, even though the meaning of the contract is clear. Rather, we think that the Court was stating that such evidence is to be used *when the contract is in need of interpretation.* Other courts have reached the same conclusion. In *N.L.R.B.* v. *Gulf Atlantic Warehouse Co.*, 291 F. 2d 475 (5th Cir. 1961), the Court discussed the decision in the *Steelworkers* case:

> "Although the Court was there dealing with the right to arbitrate, a right highly favored by the law, we think that we have a lesson to learn from this litigation—that lesson is that we generally take the terms of the contract as finally written and do not give them a special

meaning because of anything done by way of give and take during the bargaining sessions." 291 F. 2d 475, 478.

See also International Union of Electrical, Radio and Machine Workers, AFL-CIO v. *General Electric Co.*, 332 F. 2d 485 (2d Cir. 1964), *cert. denied*, 379 U. S. 928 (1964).

Since we find that the farming-out clause is clear on its face and not ambiguous, we therefore hold that evidence of bargaining history is not admissible to explain its meaning.

The fact that the Union may have waived violations of the farming-out clause in the past would not prevent it from asserting its claim against the present possible violation. Whether or not the Union knowingly waived its claim against the alleged violation by renegotiating the agreement with knowledge of the activities of the Company is a factual question to be resolved by the jury, *see Local 127, United Shoe Workers of America, AFL-CIO* v. *Brooks Shoe Manufacturing Co.*, 298 F. 2d 277 (3d Cir. 1962), as is the question of whether the action taken by the Company in reducing employment at its Owensboro plant breached the collective bargaining agreement.

The judgment of the District Court is therefore reversed and the case is remanded to the District Court for a trial by jury in conformity with the opinion of this Court.

McCree, Circuit Judge (concurring). I agree that the clause prohibiting the transfer of work is not ambiguous insofar as it proscribes transfer to another General Electric plant. Accordingly, it was error to admit evidence of negotiation discussions and past practices to interpret this provision. However, I do not understand the majority opinion to hold that the meaning of the phrase "for the purpose of curtailing or reducing employment" is unambiguous. The meaning of this phrase, as well as the determination whether there was a causal relationship between the intra-company transfer and reduction of the work force at the Owensboro plant, are issues to be determined upon retrial.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1260

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - *Plaintiff-Appellant,*

v.

GENERAL ELECTRIC COMPANY, - - *Defendant-Appellee.*

JUDGMENT—Entered January 5, 1973

Before: CELEBREZZE, McCREE and MILLER, Circuit Judges.

APPEAL from the United States District Court for the Western District of Kentucky

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case is remanded for a trial by jury.

It is further ordered that Plaintiff-Appellant recovers from Defendant-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
(s) JAMES A. HIGGINS,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-1260

LOCAL 783, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, - - *Plaintiff-Appellant,*

v.

GENERAL ELECTRIC COMPANY, - - *Defendant-Appellee.*

ORDER—Entered February 7, 1973

Before: CELEBREZZE, McCREE and MILLER, Circuit Judges.

On consideration of the Defendant-Appellee's petition for rehearing and suggestion of rehearing en banc, no Judge of this Court having moved for rehearing en banc, and the petition having been referred, under the Court's Rules, for disposition by the panel which heard the case, the motion for rehearing is denied.

ENTERED BY ORDER OF THE COURT

(s) JAMES A. HIGGINS

Clerk